PORTUGUESE CATHOLIC UNIVERSITY

Distribution Agreements

Ban on internet sales - towards a more economic based approach

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A thesis submitted in fulfilment of the requirements for the degree of Master of Law

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To my parents.
To my Godparents.
To my Grandmother.

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Abstract

The awareness of the constant and impetuous development of technology and the internet has led the European Union's agenda to target a considerable part of its efforts to strengthening the Digital Single Market. Bearing in mind that objective, on May 2015 the Commission launched a sector inquiry into the e-commerce of consumer goods and digital content as part of its Digital Single Market strategy, and has since been working actively towards this objective.

Escorting closely this recent stream, the aim of this master's thesis is to analyse one of the big concerns that the digital revolution has brought to European competition law, online sales and their regulation. Focusing particularly on the distribution agreements, this essay will be devoted to the study of the distribution law in an online context. Structurally inserted in the main area of vertical restraints, distribution agreements ought to be analysed under the remit of what both article 101 TFEU and Block Exemption Regulation dispose. Therefore, these are going to be the cornerstones of this study, along with the case law of European and national courts, which constitute a crucial tool to understand and, foremost, develop this subject, allowing for a better interpretation adapted to the necessities of the market.

Key Words: online sales, vertical agreements, distribution agreements, hardcore restrictions, restriction by object, objective justifications.

Table of Contents

Abbreviations

Commission	Commission of the European Communities
Cf.	Confront with
E-Commerce	Electronic Commerce
ECJ	European Court of Justice
EU	European Union
Guidelines	Commission Notice: Guidelines on Vertical Restrains [2010] OJ C 130/01
NCA	National Competition Authorities
No	Number
MS	Member States
Para.	Paragraph
Paras	Paragraphs
Pp.	Pages
SME	Small and Medium Enterprises
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
V	Versus
Vol.	Volume
VBER	Vertical Block Exemption Regulation: Commission Regulation (EU) No 330/2010, of 20th April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices
(Old) VBER	Regulation No 2790/1999, of 22nd December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practice

Introduction

Being the globalization process the one to blame on fastening the process of spreading information, as well as on increasing the amount of international economic operators and transactions, it has, therefore, contributed to shrinking the market barriers[1]. As a result of this phenomenon, companies felt the need to take action in order to control, as much as possible, the commercialization of their products and services, finding in distribution agreements a powerful tool to control the whole process. Nevertheless, this tool seems to be as powerful as it is hazardous, constituting one of the major concerns of the European Union's competition policy. Thus, acknowledging that the internet and technology surpass national borders, originating the possibility to operate any kind of commercial transaction worldwide, it is extremely important to understand that the legal framework needs to accompany such development, keeping up with the needs of the digital market era[2]. Therefore, our ambition with the elaboration of the hereby presented master's thesis is precisely analyse what article 101 TFEU, the new VBER and accompanying guidelines dispose, as well as courts and national authorities' decisions – mainly targeted to the physical market scenario – and, given the fact that the Commission considers a ban on online sales as a hardcore restriction[3], understand (if possible) in what sort of situations can it be justified and, thus, acceptable.

The competition law applicable to distribution agreements has, until now, been subject of important reforms: the adoption of a vertical restraints block exemption regulation in 1999 and guidelines to help its interpretation, and, later, in 2010, a renewal

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[1] The constant expansion of technologies and the internet has entailed the possibility of enlarging geographical markets, increasing the opportunities to buy and sell on a global scale, regardless of the physical barriers that traditionally used to hinder commercial transactions. For instance, while some years ago it was almost impossible for a Portuguese enterprise to sell its products in all the 27 MS of the EU, as it would be highly expensive to set brick and mortar stores in every single MS, nowadays, on the contrary, it is possible (and very common) to present the products and all their characteristics on the enterprise's website, dismissing the necessity of having a physical store.

[2] *"Simplified and modern rules for online and digital cross-border purchases will encourage more businesses to sell online across borders and increase consumer confidence in cross border e-commerce. If the same rules for e-commerce were applied in all EU Member States, 57% of companies say they would either start or increase their online sales to other EU Member States."* – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region: *A Digital Single Market Strategy for Europe*, COM (2015) 192 final, pages 4 and 5.

[3] Guidelines, para. 52.

of that regulation with the presentation of the new VBER, as well as new guidelines. Notwithstanding, if the legislation seems to have been settled, the issue has since been marked by considerable debate among the courts all over the European Union. And this debate is highly intensified when the matter is analysed from an online perspective, precisely as we are doing today.

We can point out as recent breakthrough decisions from the ECJ illustrating this latent debate the Jaguar Land Rover case[4] and the Pierre Fabre case[5]. While in the first case the ECJ clearly favoured protecting competition over the competitors and enshrined the freedom for suppliers to determine the size and extent of their distribution network, in the second case we find a more formalistic approach, with the ECJ's rule that a prohibition on online selling in a selective distribution agreement constituted a restriction by object, unless objectively justified due to the nature of the product. Along with those decisions we have many decisions from national courts and authorities that defend one position as well as the other; however, similarly to what happens in the European courts, it is not possible to identify a clear path to follow, remaining the uncertainty[6].

Reflecting this scarcity of certainty, we find a recent request for a preliminary ruling addressed to the ECJ, presented by Oberlandesgericht Frankfurt am Main[78]. The German Court questioned whether a prohibition on the members of a selective distribution system to sell via online marketplaces constitutes a hardcore restriction and also whether the preservation of a luxury image is considered an argument compatible with what Article 101(1) establishes. The answer for this preliminary request will constitute a landmark to the online sales ruling, since the Pierre Fabre case was decided under the old VBER rules and within a much different context from what we face nowadays. Therefore, one crucial conclusion can be drawn: although this topic has been discussed for long, the truth is that it is still far from being clearly settled, which corroborates the pertinence of the analysis we hereby present.

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[4] Case C-158/11: *Auto 24 SARL v Jaguar Land Rover France SAS* [2012].

[5]Case C-439/09: *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence and Others* [2011].

[6] See VOGEL, Louis, *Efficiency versus Regulation: The Application of EU Competition Law to distribution Agreements,* Journal of European Competition Law & Practice, 2013, Vol. 4, No. 3, pp. 277-284.

[7] Provincial Court of Appeal in Frankfurt am Main, Germany.

[8] Case C-230/16: *Coty Germany GmbH v Parfümerie Akzente GmbH* [2016].

I. The Digital Single Market Strategy

1. The impact of a new digital era: a renewed internal market conception

"Digital technologies are going into every aspect of life. All they require is access to high speed internet. We need to be connected, our economy needs it, people need it."

Jean-Claude Juncker[9]

The internet and digital technologies are dramatically transforming our lives and the way we work, both as individuals and in business, as they become more integrated across all sectors of society and economy. Allowing the market's expansion and the access to fresh income sources, this digital revolution creates unparalleled opportunities for innovation and growth, particularly for small and medium-sized enterprises[10]. Nonetheless, as beneficial as it may be, allowing to overcome the traditional physical barriers, it also raises challenging and intricate policy issues, mainly concerning competition fairness between undertakings[11] operating, or trying to operate, in the market, regulation of commercial practices, the freedom of access to the market both for consumers and for enterprises and the protection of intellectual property rights and privacy[12]. It is indeed understandable why EU competition law is so deeply concerned with studying, developing and regulating these matters.

Over the past few years e-commerce has seen a tremendous expansion all over the globe, the EU being the largest e-commerce market in the world[13]. Facing the

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[9] JUNCKER, Jean-Claude*, 2016 State of the Union address*: presented before the Members of the European Parliament, in Strasbourg (4th September 2016).

[10] In a survey in which more than 4800 SMEs in 12 countries took part, McKinsey&Company researchers concluded that SMEs using internet technologies grew more than twice as fast as the ones that had a minimal web presence – see MANYIKA, James & ROXBURGH, Charles, *The great transformer: The impact of the Internet on economic growth and prosperity,* McKinsey Global Institute, October 2011, a survey retrieved from the website http://www.mckinsey.com.

[11] The concept of "undertaking" was established in the Hofner & Elser case as *"every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity."* – Case C-41/90: *Höfner & Elser v Macroton GmbH* [1991], para 21.

[12] See CIAN, Marco, *Competition and Access to the Market A Need for a Special Regulation in Online Service Supplying?,* EuCML: Journal of European Consumer and Market Law, Issue 1-2/2015, page 47.

[13] See European Commission, Preliminary Report on the E-commerce Sector Inquiry, SWD (2016) 312 final, page 8.

inevitable reality of its constant growth, achieving a single market fully adapted to the new digital era will give Europe the possibility of maintaining its position as the world leader in the digital economy, allowing its companies to grow on a global scale.

In the wake of these concerns, Europe has given the kick-off and launched the tactics to embrace the new digital reality. Starting with the Lisbon Strategy, that aimed to make the EU one of the most competitive and dynamic knowledge-based economies, it introduced the Digital Agenda for Europe, which proposed to explore the potential of the internet and technologies as a way of to fostering innovation, economic growth and progress [14][15]. Yet, it was not until 2015 that the Commission decided to implement a strategy aimed at developing a Digital Single Market[16]. With it, the Commission ambitions to create a single market where everyone "*can access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence*"[17] thus, creating better access for consumers and businesses to online goods and services across Europe, creating the right conditions for digital networks and services to flourish and maximising the potential growth of a European digital economy, the primary goals towards the construction of this ambitioned Digital Single Market[18].

[14] Presented by the Commission, the Digital Agenda is one of the seven pillars of the Europe 2020 Strategy, which sets goals for the growth prospecting the year 2020.

[15]As we can testify with the Europe 2020 strategies' goals and the measures taken afterwards, although this concern about adapting to the new digital era reality gained strength recently, the EU had not until then been unaware of the necessity. In fact, in May 2010 the Commission published a report entitled *"A new strategy for the single market at the service of Europe's economy and society*", assigned to create a consistent strategy to develop the European single market. Also, in 2011, digital content products were subject of provisions in the *Directive on consumer rights* – Directive 2011/83/EU of the European Parliament and of the Council of 25th October 2011 on consumer rights, amending Council Directive 93/13/ECC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/ECC and Directive 97/7/EC of the European Parliament and of the Council [2011] L 304/64 – and in the *Proposal for a Common European Sales Law* – Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final – 2011/0284 (COD).

[16] More recently the EU has presented two new proposals: *Online Sales Directive* - Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635 final -, and *Directive on the Supply of Digital Content* – Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final.

[17] Communication from the Commission: *A Digital Single Market Strategy for Europe*, *op. cit*, page 3.

[18] See Communication from the Commission: *A Digital Single Market Strategy for* Europe, *op. cit,* pp. 2-4.

Being the cornerstone of the EU's integration and sustainable growth, the internal market[19] can be defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the EU legislative provisions. Facing the reality stated above about the integration of the internet and technologies across all sectors of society and the economy, affecting both people's private lives and their business relations, the Digital Single Market can be perceived as a natural extension of this fundamental principle, constituting a necessary step to bring the EU into the digital age[20]. However, we must be aware of the difficulties that will come along with this attempt at implementing a Digital Single Market, as Mario Monti[21] has pertinently warned us back in 2010. Triggered by the crisis scenario it is going through, the EU struggles to deal with the imminent threat of insuring the cohesion of the single market, as Member States disbelieve the strength and efficiency of the EU policies and choose to pursuit protection under economic nationalism.

2. The need for a legal framework adaptation

Bearing in mind all that was stated above, we can now undoubtedly conclude that the EU is facing the need to adapt the legal framework that supports its competition policy to the new digital reality so that it does not become obsolete[22]. If the legislative scarcity proceeds the repercussions will be drastic as it originates entrance barriers, suppresses competition and diminishes the future investment throughout Europe[23]. Furthermore, more than the need for adaptation, there is a real need to create new solutions[24] as online markets are becoming so peculiar from the point of view of the

[19] The internal market concept is enshrined in article 3 (c) TEU and in article 26 TFEU.
[20] TOBIAS, James, *What you need to know about the digital single market*, Managing Intellectual Property, December 2015/ January 2016, retrieved from the website www.managingip.com.
[21] MONTI, Mario, *A new strategy for the single market at the service of Europe's economy and society* – Report to the President of the European Commission José Manuel Barroso, 2010, page 6.
[22] The Commission had already come to this conclusion – see Communication from the Commission: *A Digital Single Market Strategy for Europe, op. cit*, page 4.
[23] See FRANCESCHI, Alberto De, *The EU Digital Single Market Strategy in Light of the Consumer Rights Directive: The 'Button Solution' for Internet Cost Traps and the Need for a More Systematic Approach,* EuCML: Journal of European Consumer and Market Law, 2015, Issue 4/2015, page 144.
[24] We must however point out that there are some authors who disagree with this suggestion, defending that there is no need to create new rules – see BUCCIROSSI, Paolo, OECD Policy Roundtables – Vertical

access to them and of the pathways by which information spreads, that rules and the principles of law conceived for traditional markets are not always adequate tools for ensuring competition and business freedom[25].

As a matter of fact, if we must applaud the recent efforts from the Commission[26], it is unfortunately not possible to do so when we talk about vertical restrains, especially when we dwell on distribution agreements. Stating that *"every distributor must be allowed to use the internet to sell products*", the Vertical Guidelines, and the VBER itself, still, leave plenty of space for uncertainty and questionable matters that ought to be clarified[27].

By affecting the way goods circulate from manufacturers to consumers, the internet has brought the possibility to arrange new distribution methods. Speeding up the whole process, the internet allows retailers to transfer the orders to wholesalers, who are now able to deliver the goods directly to the consumer, circumventing the necessity of having a retailer to physically handle the goods[28]. Notwithstanding, this possibility may lead to a latent conflict between manufacturers and distributors, as the former might diminish distribution opportunities on the internet by affixing reservation clauses in their contracts[29], such as exclusive distribution clauses or selective distribution clauses. Why would this type of clauses be affixed? Either to take control over distribution with the ambition to control price and quality of distribution, to alleviate free-riding, to restore the incentives of retailers to increase sales effort or even to build a reputation for high quality and convey a desired brand image, there are plenty of reasons that can lay

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Restraints for On-line sales: Background Note, 2013, DAF/COMP(2013)13, retrieved from http://www.oecd.org.

[25] CIAN, Marco, *op. cit*, page 49.

[26] As good examples, we must mention the agreement reached in February 2017 establishing new rules allowing Europeans to travel and enjoy online content services across borders, as well as the decision to put an end to roaming charges in the EU in 2017, discussed and agreed by the Commission back in September 2016 and the draft rules that followed this decision.

[27] Even with the publication of the new VBER the uncertainty remained. Some authors ascribe this lack of regulation and certainty due to the extensive lobbying in relation to the treatment of internet sales. – see HALL, Mathew & RAKISON, Robert, *New EU Rules for Distribution and Supply Agreements,* EuroWatch, 2010, May 15th, pages 10 and 11; and also NEILL, Simon, *Vertical Restraints Block Exemption: Implications for online retailers,* Osborne Clarke, publication number 9340319, retrieved from http://www.osborneclarke.com.

[28] see LIEBER, Ethan & SYVERSON, Chad, *Online v. Offline Competition,* The Oxford Handbook of the Digital Economy, Oxford University Press, 2012, pp. 189-223.

[29] See KIRSCH, Andreas & WEESNER, William, *Can Antitrust Law Control E-Commerce? A Comparative Analysis in Light of U.S. and E.U. Antitrust Law*, University of California Davis Journal of International Law and Policy, 2006, Volume 12:297, page 300.

beyond the existence of this type of restriction clauses[30]. The question that remains unanswered is whether these restriction clauses are in accordance with what the European competition law conceives, and our duty is to find the right response throughout the elaboration of this master's thesis.

[30] Commission Staff Working Document: *Preliminary Report on the E-commerce Sector Inquiry*, SWD (2016) 312 final.

II. Vertical Agreements

1. Introduction

Prior to any development, we shall clarify a very important distinction between horizontal and vertical agreements. Whereas horizontal agreements are celebrated between parties operating at the same level of the economy, therefore competing, or aiming to compete, directly with each other, vertical agreements are the ones celebrated between parties operating at different levels, producing complementary products or services, thus providing the connection in the distribution chain until the product or service reaches the final consumer[31]. These two different ways of contracting diverge in their potential anticompetitive effect[32], however, they are covered by the same competition regulation[3334].

During the commercialization process, a manufacturer is not merely concerned with producing the product he aims to sell, but he also has to plan how the distribution will be done. Either he has enough resources to do it by himself or he considers it preferable to leave distribution to independent entities that are experienced in retailing – what usually happens considering that the *"resources required to organise a network of retail outlets may be large and the time taken to penetrate a market too long when a firm first has a product to bring to the market"*[35]. Being the most commonly used distribution method, the use of a third party is also the one that originates more problems from the

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[31] JONES, Alison & SUFRIN, Brenda, *EU Competition Law: Text, Cases, and Materials,* Fifth Edition, Oxford: Oxford University Press, 2014, page 768.

[32] "Whereas the latter [horizontal agreements] may eliminate competition between competing undertakings, the former [vertical agreements] concerns the relationship between upstream operator and downstream distributor or retailer. As a result, vertical agreements often generate positive effects and would raise concerns predominantly when there is some degree of market power at the upstream and/or downstream levels." – See EZRACHI, A., *EU Competition Law: An Analytical Guide to the Leading Cases,*London: Hart Publishing, 2016, page 149.

[33] Case 32/65: *Government of the Italian Republic v Commission of the European Economic Community* [1966], page 407.

[34] It was not always consensual that article 101 should also be applicable to vertical agreements, however, since the Costen and Grundig Case, it became fully accepted that vertical agreements are also able to contain restrictions of competition which must be target of close scrutiny under European competition rules, namely article 101 - see Joined Cases 56 and 58/64: *Etablissements Costen SARL and Grundig-Verkaufs GmbH v Commission of the European Economic Community* [1966], page 339.

[35] KORAH, V. & O'SULLIVAN, D., *Distribution Agreements Under the EC Competition Rules,* Oxford: Hart Publishing, 2002, page 9.

point of view of the EU competition law[3637]. As this type of agreements can lead to a partition of national markets, it constitutes a major danger for the disaggregation of the single market, justifying the European competition law's concerns on investigating this type of agreements in order to protect the single market integration[38].

Through the analysis of the literature dwelling on these matters, we understood that different authors have different ways of organizing the distribution methods and types of distribution agreements. As we find it the most logical way of doing it, we will, henceforth choose to follow the organization used by Richard Wish[39].

2. Distribution methods

Aiming to lessen the costs, a manufacturer has the option to distribute its goods himself, developing an internal network throughout vertical integration. There are plenty of reasons why he may choose this way of distributing, the most common of which being the aim to achieve a high degree of efficiency and coordination, since the product in question is not handed from one undertaking to another, or to be exempted from the application of competition rules, as the internal matters of the economic organization do not fall under the scope of article 101(1)[40].

He can also opt for celebrating an agency agreement, delegating the distribution to an agent who will be "*vested with the power to negotiate and/or conclude contracts on behalf of another person (the principal)"*[41]. This agent will have the duty of negotiating sales or purchasing agreements and celebrating contracts on the producer's behalf, running no risk himself since the property does not pass on to him, regardless of

[36] JONES, Alison & SUFRIN, Brenda, *op. cit*, page 773.

[37] If the manufacturer decides to do the distribution by himself it is likely that the Commission does not investigate, unless it constitutes an abuse of a dominant position. - see WISH, Richard, *Competition Law,* Third Edition, London: Butterworth & Co, 1993, pp. 537.

[38] See Joined Cases C-403/08 and C-429/08: *Football Association Premier League Ltd v QC Leisure* [2011], paras 115 and 139; and also, Joined Cases C-468/06 to C-478/06: *Sot. Lélos kai Sia and Others* [2008], paras. 65 and 66.

[39] WISH, Richard, *Competition Law, op. cit,* pp. 536-602. To know more about other different organization methods, see KORAH, V. & O'SULLIVAN, D., *op. cit,*, and, also, VOGEL, L. & VOGEL, J., *European Distribution Law,* Paris: LawLex/Bruylant, 2015.

[40] WISH, Richard, *Competition Law, op.cit,* page 538.

[41] Vertical Guidelines para. 12.

the fact that he is the one celebrating the contract[42]. As the agent just negotiates on behalf of the principal, the Commission has stated that in specific cases[43] he should be treated as part of the principal's organisation, so the agreements celebrated become an internal matter of that organisation rather than an agreement between undertakings, therefore falling outside the scope of article 101(1)[44][45].

When a producer does not distribute the goods or services himself or through an agent, he has to leave it to a third party who will do the resell on its own behalf, the independent distributors. There is therefore the need to celebrate a distribution contract, and it is precisely here where EU concerns begin, since a manufacturer can negotiate them by plenty of different manners. He can impose on the distributor to sell exclusively within a certain territory or even restrict the distribution to a certain number of distributors per area. There is also the possibility of establishing that only the retailers that can provide certain services are able to sell his products, as well as many other options. The problem is, as it was already stated above, to find out whether those restriction clauses are legal from the scope of the EU competition rules.

3. Types of distribution

Franchising Agreements: The ECJ has defined the distribution franchise agreement in Pronuptia Case as an agreement by "*which the franchisee simply sells certain products in a shop which bears the franchisor's business name or symbol*"[46]. The core of a franchisor activity is the development of a common business format, paying a fee for the right to do that and accepting the responsibility to preserve the character of the franchise[47]. Targeting to guarantee uniformity of all the outlets and, consequently, the maintenance of reputation, from a strictly commercial point of view, this type of

[42] See WISH, Richard & BAILEY, David, *Competition Law,* Seventh Edition, Oxford: Oxford University Press, 2012, page 621.
[43] Vertical Guidelines, paras. 12-20.
[44] See JONES, Alison & SUFRIN, Brenda, *op. cit*, page 770; WISH, Richard & BAILEY, David,*„op. cit*, page 539; and also KORAH, V. & O'SULLIVAN, D., *op. cit,* page 5.
[45] Notwithstanding, we must be aware that in some cases an agent can be considered as an independent undertaking, so there is always the need to analyse each concrete situation in order to understand whether it benefits from the exemption – see Case C-180/98: *P. Pavlov and Another v. Stichting Pensionsfond Medische Specialisten* [2001], paras. 70 and 71.
[46] Case 161/84: *Pronuptia* [1986], para. 13.
[47] WISH, Richard, *Competition Law op. cit,* page 544.

agreement may constitute an advantageous way of cooperation by working through the establishment of a hierarchy and also by giving the possibility to work with independent dealers who may have a greater incentive for obtaining better results[48].

Exclusive Purchasing Agreements: The Commission has described them as *"agreements under which the purchaser accepts an obligation to purchase particular goods from a single supplier only, over a relatively long period*"[49]. Exclusive purchase agreements may prove to be beneficial at the level of efficiency, since the producer will have a guaranteed outlet for its products, which allows him to rationalize the production. This type of agreements may also be appealing for maintaining the demand, given the fact that a distributor who can purchase from only one producer will have an incentive to promote and increase sales of that specific product. From the purchaser's point of view the agreement can also prove to be beneficial since the producer will be more willing to give it preferential terms, assistance with promotion or any technical advice[50].

Exclusive Distribution Agreements: An exclusive distribution contract occurs when a manufacturer agrees with a distributor that he is only allowed to sell that manufacturer's products within a certain territory, ensuring the distributor that he will be the only one in that specific territory[51]. By establishing a monopoly, this type of agreements can force a market foreclosure by diminishing the intra-brand competition and portioning the market, thus, increasing the possibilities of distorting competition within the internal market. However, while reducing intra-brand competition they can also originate an increase on inter-brand competition, leading to an ambivalent effect. Consequently, it has been demonstrated to be vital to embrace an economic analysis as the negative effects caused can be compensated by the beneficial effects[5253].

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[48] KORAH, V. & O'SULLIVAN, D., *op. cit,* page 7.
[49] European Commission, *Seventh Report on Competition Policy* (1978), para. 9.
[50] WISH, Richard, *Competition Law, op. cit,* pp. 542 and 543.
[51] To conclude for the existence of an exclusive agreement infringing article 101(1) it must be proved that there was an offer from the supplier and an acceptance by the distributor. It is not possible to base the argument upon a tacit acceptance. - see Case T-208/01: *Volkswagen v. Commission* [2003], para. 59.
[52] VOGEL, L. & VOGEL, J., *op. cit,*, page 100.
[53] The Costen & Grundig case was one of the first cases in which the ECJ considered the application of article 101(1) to exclusive distribution agreements - Joined Cases 56 and 58/64, *op. cit.*

Selective Distribution Agreements: We have a selective distribution agreement whenever a supplier not only selects its retailers, but also only allows them to sell to final buyers or selected dealers. This type of agreements is often used for technically sophisticated and for luxury goods to maintain the brand image of the products[54].

By applying selection criteria concerning the nature of the product, this type of agreements will limit the number of undertakings able to resell the products. When it comes to the selection criteria applied, we must establish the distinction between qualitative and quantitative criteria. Qualitative criteria consist of only accepting distributors based on objective criteria essential to the concrete distribution process - such as training of sales staff, the services provided at the point of sale or the assortment of products sold. On the other hand, quantitative criteria consist of limiting the number of authorized distributors within a certain area or imposing a certain level of sales[55].

4. Treatment under the European Union competition rules

4.1. Article 101 TFEU

The necessity of ruling specifically vertical agreements under article 101 may be easily explained by the double goal of European competition policy. On the one hand, agreements between producers and distributors can have a pro-competitive slant as they can help promote market integration and efficient distribution. On the other hand, an anti-competitive slant can also be found, since this kind of agreements can be used to partition market and to exclude the possibility of new entrants. Therefore, it is immediately detectable that the EU competition policy needs to regulate this matter. In fact, being aware of the economic context proves to be crucial for understanding the specific agreement and its impact on competition and, thus, its treatment under article 101[56].

[54] One of the main reasons for a manufacturer to limit the number of retail outlets is precisely because he wants his products to be sold by retailers with the sufficient skill and competence.
[55] GOYDER, Joanna, *EC Distribution Law,* London: Chancery Law Publishing, 1993,hori pp. 99 – 112.
[56] In this respect see FAULL, Jonathan & NIKPAY, Ali, *The EC Law of Competition,* Oxford: Oxford University Press, 1999, page 62; Case 6/72: *Europemballage Corporation e Continental Can Company* v. *Commission* [1973]; Case 27/76: *United Brands Company v. Commission* [1978];

The analysis of whether an agreement should be excluded[57] for infringing article 101 takes place in two major steps. Firstly, the agreement shall fall under the scope of what number 1 precludes. Then, it is necessary to ensure that it is not exempted under what number 3 sets out. But before entering any considerations, it is extremely important that we bear in mind that nowadays understanding how markets operate is an essential prerequisite for any analysis. Therefore, the examination of any agreement under the scope of article 101 demands rigorous attention to the market structure, both the geographic extent and the relevant products or services should be defined with precision.

Addressing particularly its number 1, it is established that certain restrictive agreements celebrated between independent undertakings, whether they are horizontal agreements or vertical agreements, shall be prohibited for their incompatibility with the rules of the common market. As a matter of fact, when undertakings are actual or potential competitors, what they may decide together can affect the market structure, therefore it may be of interest to the competition authorities to analyse this type of practices.

In order to apply this prohibition there are three bullet-points that must be completed: first of all, we must be facing a collusion or joint conduct - as the article itself explains, there should be an agreement or concerted practice between two or more undertakings or a decision by an association of undertakings; secondly, we must conclude that the collusion appreciably restricts competition- meaning that it has as its object or effect the prevention, restriction or distortion of competition, either from an individual point of view or from an extended perspective, referring to the competition as such[58]; lastly, it must have an appreciable effect on trade between Member States[59].

When the first step is fully completed, it is time to proceed and see whether the agreement is eligible for what number 3 determines. It provides an exception from the

[57] We must, however be aware that according to the nullity clause presented by the no 2, the agreements and decisions as a whole should be unenforceable, but only if the restrictive elements cannot be separated from the remainder. Thus, only the elements that contain any kind of restriction are compelled to be banished, recalling the severity of the punishment for the national court to apply its own contract law – cf. Case 319/82: *Sociéte de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH und Co KG* [1983], para 11.

[58] See Joined cases C-501, 513, 515 and 519/06-P: *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission*, para. 63.

[59] While evaluating if the trade between Member States is affected, the agreement should be analysed as a whole and not exclusively the provisions that could possibly restrain competition. – see Case 193/83: *Windsurfing International Inc v Commission* [1986], para. 96.

general prohibition, conceiving an individual exemption to the agreements that can prove to have a beneficial effect on general welfare. As the ECJ has held, an agreement shall be exempted whenever "*the advantages of the system for the competition outweigh the disadvantages*"[60]. That being said, it is possible to conclude that parties should be extremely careful with every step they take, as the same behaviour, depending on the effects it can create, may either be or not be legal[61]. Since it is an exception, it must be applied as strictly as possible, thus only indispensable restrictions may be exempted and only for the minimum period necessary to enable the parties to achieve the benefits justifying the exemption.

4.2. Block Exemption Regulation

Notwithstanding its tremendous value, article 101 has, since the beginning, raised questions about its own interpretation. Aiming to clarify those questions, the Commission has adopted some formal decisions under Regulation 1/2003[62] and has introduced some "comfort letters". However, facing a shrieking backlog, the Commission felt the need to adopt an approach to block exemptions. Therefore, under Council Regulation 19/65[63], the Commission has been able to adopt block exemption regulations defining certain categories of agreements which can be protected under the scope of article 101(3). This regulation was a huge improvement, helping to reduce the mentioned backlog, nevertheless, it was heavily criticised for its formalism. Embracing that criticism, the Commission has since been putting an effort on implementing a more economic-based approach, focusing on the market power and market outcomes rather than exclusively on the type of agreement[64]. Following this vein, in 1999, the Commission came up with a Vertical Block Exemption Regulation[65] which ought to be

[60] Case 75/84: *Metro SB-Großmärkte GmbH & Co. KG v Commission* [1986], para 49.
[61] HUBERT, Patrick *et al*, *Day-to-Day Competition Law: A Practical Guide for Businesses,* Brussels, Éditions Bruylant, 2014, page 180.
[62] Council Regulation (EC) No 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[63] Council Regulation (EC) No 19/65/EEC of 2nd March on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices.
[64] BISHOP, Simon and WALKER, Mike, *The Economics of EC Competition Law: Concepts, Application and Measurement,* London: Sweet & Maxwell, 2010, pages 158-160.
[65] Commission Regulation No 2790/1999 of 22nd December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

applied to vertical agreements, along with some guidelines[66] meant to clarify its interpretation and hence its application. This regulation has, however, expired on May 2010, and, given its *"overall positive experience with the application of that Regulation (...) and taking into account further experience acquired since its adoption"*, the Commission decided to adopt a new VBER: Regulation 330/2010[67].

Along with article 101, VBER constitutes a fundamental cornerstone of the study of vertical agreements, establishing that the agreements falling under its scope should be exempted from the prohibition preconized by article 101(1), as long as they do not contain any hardcore restriction[68]. Providing a "safe harbour"[69], only the agreements celebrated between parties who hold a market share between 15% and 30%[70] which do not contain any of the restrictions listed in article 4 will benefit from this exemption. Any agreement containing such a hardcore restriction is presumed to fall within article 101(1), being presumable[71] as well that the agreement is unlikely to fulfil the exemption provided by article 101(3). What we end up finding here is a double presumption[72]: it is presumed that they are likely to have negative effects on competition, as well as that they do not have any positive effects that could exempt them from the application of what article 101(1) precludes.

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[66] Commission Notice: Guidelines on Vertical Restrains [2000] OJ C 291/01.

[67] Commission Regulation No 330/2010, of 20th April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

[68] The concept of hardcore restriction will be properly explained in the next chapter.

[69] When the agreement is within this safe harbour, there is no need to consider the application of article 101(1) – see Case C-260/07: *Pedro IV Servicios SL v Total España SA* [2009], para 36.

[70] *"When both undertakings have a market share below 15%, the agreement does not fall within the scope of application of the article 101(1) (...). Only in one case is that possible: for markets where there is a cumulative effect of parallel networks of similar agreements, these market share thresholds are reduced to 5%."* - See *Commission Notice on Agreements of Minor Importance that do not Appreciably Restrict Competition Under Art 101(1) TFEU,* 2001, OJ C368/13.

[71] We hereby use the expression "presumable" as any operator has the possibility to demonstrate that his agreement, individually considered, has pro-competitive effects under article 101(3).

[72] This double presumption can however be contestable. As Accardo mentions, "*In practice, the double presumption simply means that the usual order of bringing forward evidence is reversed in the case of a hardcore restriction.*" – ACCARDO, Gabriel, *Vertical Antitrust Enforcement: Transatlantic Perspectives on Restrictions of Online Distribution Under EU and US competition Laws,* European Competition Journal, Vol. 9, No 2, page 269, note no 113.

III. Online distribution agreements

1. Introduction

It was not until the new VBER came out that the EU managed to introduce regulation regarding online sales in its vertical restraints framework. Prompting intense debate hitherto, the Commission soon understood that some action was needed. Therefore, to ensure that a suitable solution would be found, it decided to consult[73] the stakeholders before publishing the new VBER, collecting many constructive opinions. Among all of them, we were, undoubtedly, able to perceive two different parties. On one side, we had pure internet players, arguing that any restriction to online sales should be prohibited since they may distort the competition. On the other side, we had the suppliers of branded products who strongly contended that imposing restrictions to online sales was essential in order to maintain a standard quality of their products and, thus, the brand's reputation, constituting the pre- and post-sales services at the point of sale almost a *conditio sine qua non* to achieve it [74].

Notwithstanding the mighty ambitions, what the new VBER and the accompanying Guidelines established was rather disappointing when it comes to online sales, as it only follows the Commission's traditional approach with a few alterations[75]. Actually, it does not particularly address any new rule concerning online sales, opting to simply introduce more specific hardcore restrictions regarding selective distribution, leaving to the Guidelines the burden of developing the online sales topic. This decision can be highly criticised since the Guidelines are not a binding, as VBER is, limiting the practical effectiveness of what is established there[76]. However, some voices among the

[73] Firstly, on 17th September 2008, the Commissioner met with senior consumer and industry representatives to discuss the opportunities and barriers to increase online retailing in Europe. And, later, on 28th July 2009, the Commission launched a public consultation on its revised VBER and accompanying Guidelines.

[74] For a deeper understanding see GERARDIN, Damien, *et al*, *EU Competition Law and Economics,* Oxford: Oxford University Press, 2012, pp. 491-495.

[75] BELLIS, Jean-François, *The New EU Rules on Vertical Restraints,* retrieved from http://www.ideff.pt, page 2.

[76] See AMATO, F., *Internet Sales and the New EU Rules on Vertical Restraints,* The CPI Antitrust Journal, 2010, page 11.

literature defend that this decision appears to be wise, as at that time there was no legal precedent, either case law or decisional practice, which the Commission could rely on[77].

2. Passive and active sales

The Guidelines, in their paragraph 51, provide us with the distinction between passive and active sales, which is a traditional distinction adopted by the Commission that is crucial to the appreciation of the lawfulness of any agreement[78]. While active sales are so qualified when there is any approach - advertisement or promotion - specifically targeted at a territory or customer group exclusively reserved to another supplier, passive sales are the simple response to unsolicited requests from individual customers, including the delivery of goods or services to such consumers. Thus, we could be misled into thinking that selling through a website constitutes an active sale however that is far from the truth, as the Guidelines clearly state in their paragraph 52. The disentanglement between general and targeted advertising or promotion may be very difficult to do though[79]. Notwithstanding, given the fact that internet sales are considered passive sales, any sale made through the internet to another territory or customer base cannot be restricted, since "*In principle, every distributor must be allowed to use the internet to sell products*"[80], which is possible to do when we are talking about physical (or brick and mortar shop) sales. In this context, a question emerges: is that difference of treatment justified? Shouldn't it be expected of EU competition law not to promote one form of distribution over another?

In our opinion, even though it is understandable that the ambition behind this decision was to promote an unrestrained online distribution, the Commission has failed in analysing this issue from a practical perspective, as it is not possible to draw a clear distinction between passive and active sales. In fact, some online retailers own such a powerful brand awareness and strength that they don't need to promote themselves actively to attract sales. And we cannot ignore the existence of indirect targeting that

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[77] GERARDIN, Damien, *et al*, *op. cit,* page 492, footnote 208.
[78] BAEZA, Teresa Ortuño, *"La licencia de marca",* Madrid: Marcial Pons, 2000, page 358.
[79] In fact, through the internet consumers are able to check prices and buy goods in many websites without focusing their attention on their own geographic area. - European Competition Lawyers Forum (ECLF), *Comments on the Draft Block Exemption and Guidelines on Vertical Restraints*, retrieved from https://ec.europa.eu/commission/index_en, page 13.
[80] Guidelines, para. 52.

endangers the presumption that online sales constitute passive sales. A good example is the language options used on the website or in the communication play. Despite the fact that the Guidelines in their paragraph 52 state that normally that does not interfere in the qualification, the truth is that no business will voluntarily invest in a foreign language website unless it believes some return from it. What happens is that the *"Commission proceeds with not considering online space as parallel to the physical, but more as a complementary*"[81], and there lays the answer to the current distinctive treatment, which we firmly condemn.

3. Restrictions that may remove the benefit of block exemption

3.1. Restriction by object

Through the history of EU competition law, vertical restraints have always been treated very strictly due to the hostility towards any menace to the trade between Member States[82]. In fact, conscious that it could spawn net efficiencies, a more efficient redistribution of wealth, as well as a decrease on the possibility of originating a monopoly, the ambition of constructing a solid and cohesive single market - where there is freedom of movement of goods, people, services and capital over border- has always been a primordial objective of the EU[83].

In order to comply with this ambitious goal, the Commission defined for the first time the concept, already adopted by the EU Courts, of "*restriction by object*" in its guidelines on the application of article 101(3). With this concept, the Commission aimed to identify those restrictions which by their nature have the object or effect of noticeably restrict competition, thereof, being capable of affecting trade between MS[84], being the mere potentiality of competitive harm of restricting competition sufficient to

[81] A S Watson Europe, *Response to the Commission's review of the Block Exemption Regulation and Guidelines on vertical restraints*, retrieved from https://ec.europa.eu/commission/index_en, page 5.
[82] HAWK, Barry E., *System Failure: Vertical Restraints and EC Competition Law,* Common Market Law Review, vol. 32, 1995, page 973.
[83] See PAIS, Sofia Oliveira, *Entre Inovação e Concorrência,* Lisbon, Universidade Católica Editora, 2011, page 64.
[84] VIJVER, Tjarda van der & VOLLERING, Stefan, *Understanding appreciability: The European Court of Justice reviews its Journey in Expedia,* Common Law Market Review, Vol. 50, 2013, pp. 1136.

raise the alert[85]. Whereas an agreement has been found to restrict competition by object, it becomes unnecessary to operate a separate appreciability test[86]. As the author Vogel says, "*The innovation of the restriction of competition by object by the European legislator and judges is thus part of general trend to improve the detection and repression of anticompetitive behavior*" [87]. Notwithstanding, as it was noted by the Advocate General in the Cartes Bancaires case[88], the advantages of its use can only materialize if its scope and boundaries are precisely circumscribed[89].

3.2. Hardcore restrictions

Similarly to the old VBER, in the new one we find a black-clause defining the restrictions that prevent the application of the block exemption, which could otherwise be applicable where all the exemption criteria are fulfilled. Therefore, it allows companies that do not exceed a certain market threshold to have more flexibility in the negotiation of vertical agreements, which, as the authors Subiotoo and Dautricourt[90] enhance, is a decision that must be applauded.

Focusing particularly in the online context, we face a slightly different scenario. Introducing more strictness, the Guidelines clearly state in their paragraph 52 that every distributor must be allowed to use the internet to sell products. Thus, any restriction that prevents distributors from selling their products online can constitute an outright ban, being eligible as a hardcore restriction. In the same paragraph, the Guidelines provide us with a non-exhaustive list of examples of clauses which restrict passive sales in the internet context, identifying some of the hardcore restrictions that shall be censured, such as website re-routing (a); termination of the transaction once it is detected that the credit card data address is not within the distributor's territory (b); limiting the proportion of online sales (c); and setting a higher price for products to be sold online than products to be sold offline (d).

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[85] See Case C-8/08: *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009], para. 17.
[86] Case C-226/11: *Expedia Inc v Autorité de la concurrence and Others* [2012], paras. 36 and 37.
[87] VOGEL Louis, *The recent application of the European Competition Law to distribution agreements: a return to formalism?,* Journal of European Competition Law & Practice, 2015, Vol. 6, No 6, page 455.
[88] Case C-67/13 P: *Cartes bancaires v Commission* [2014].
[89] See ZAMPA, Gian Luca & GIÒ, Alessandro Di, *The Conundrum of Restrictions "by object": Rationale, Scope, Impact and a Proposal,* Rivista Italiana di Antitrust, No 3, 2015, page15.
[90] SUBIOTOO QC, Romano & DAUTRICOURT, Camille, *The Reform of European Distribution Law,* World Competition, Vol. 34, No 1, 2011, page 14.

3.3. Acceptable restrictions

These forbidden restrictions may, however, be objectively necessary under exceptional circumstances and, therefore, acceptable. That being said, we must be aware of the existence of some individual cases of hardcore restrictions that may either fall outside the scope of article 101(1) or fulfil the conditions precluded by article 101(3)[91].

The Guidelines, again, provide us with a non-exhaustive list of examples, we hereby leave some of them. By reading paragraph 53, we find as an acceptable restriction the possibility of a supplier require quality standards for the use of the internet site to resell goods, conceiving, thereof, the possibility to restrict the means of an active sale. Moving on to paragraph 54, we find out that it is also acceptable for suppliers to regulate online sales by subjecting them to certain proportionate quality standards and other lawful requirements[92]. They must nevertheless be cautious since these standards and requirements cannot lead to the dissuasion of appointed distributors of having access to the internet to reach a greater number and variety of customers. To conclude this set of examples, reading paragraph 56 we find that the Guidelines allow the suppliers to require that a distributor have at least one brick and mortar shop. We must, however, note that such requirements will only be lawful when the product in question is of such nature that it justifies the requirement of a physical outlet[93]. Along with these situations the Guidelines allow, in their paragraph 60, the introduction of an objective justification in order to exempt a hardcore restriction. Once again, a list of non-exhausting examples is set, such as the possibility of a distributor first selling a new brand to impose some restrictions to recoup the investment made and the possibility to restrict the active sales while testing or introducing a new product[94].

From the examples above we may conclude that the Commission has really put a notable effort on adapting to the new digital reality and achieving a more economic-

[91] Guidelines, para. 60.

[92] The ECJ had already delimited the concept of "proportionate" in the L'Oreal case – cf. Case 31/80: *L'Oréal* [1980], para 16.

[93] See Guidelines paragraph 176.

[94] Before its introduction on the VBER, national courts already defended its application – see Cour d'Appel de Paris, 4ème Chambre- Section B, Decision of 18th April 2008: the French court upheld the legality of a selective distribution system that required an one-year period prohibition of active selling and, therefore, prohibited online sales of new products for a year following their introduction to the market.

based approach. Notwithstanding, by setting just a short list of acceptable restrictions combined with a clause that allows the use of objective justifications, it outbursts in a rather generalist solution, leaving space for numerous interpretations, thereof, claiming for an interpretation which ought to be made by the European and national courts and authorities.

IV. Prohibition of internet sales

1. Introduction: the origin of the debate[95]

Following what was stated above, it is fair to conclude that the evolution of the internet as a new distribution channel, aligned with the absence of clear and unequivocal regulation and guidance, has been the source of a quite reluctant behaviour endorsed by the undertakings operating in the market. Anchored to this uncertainty, suppliers continuously opt to include in their distribution networks bans on the use of internet sales, offering a wide range of justifications concerning the nature of the products at issue, such as the aim to protect the prestigious image of their brand or even consumer health concerns[96]. Also reflecting this uncertainty scenario, we are presented with a variety of national case law attempting to balance competition concerns against distributors' efforts to control their distribution networks[97].

Both the Commission and the European and national courts tend to defend that a restriction on the use of the internet by dealers who have been authorised to enter the network distribution is not allowed under what article of 4(c) VBER states. Drawing inspiration from the solutions promoted by the French and German courts and authorities, we must say however that even though the Commission considers the ban on online sales as a hardcore restriction, the truth is that the Guidelines provide suppliers with some degree of control over internet sales[98]. This breach to a less severe point of view, aligned with the fact that the undertakings' worries should not be

[95] We hereby try to offer an analysis made through a global perspective, as the ban on internet sales is not an exclusive problem of selective distribution systems. Notwithstanding, before entering any considerations, we must warn that most of the literature treats this problem only from a selective distribution perspective, which constitutes an unsurprising fact though, since in this type of systems retailers (luxury brand owners, mainly) are required to make significant efforts, such as investments in the appearance of the shop, as well as in the pre- and post-sale services provided, including staff recruiting and training.

[96] However, when approached by NCAs, the majority of distributors entered into settlements and abandoned such blanket clauses. For instance, see Festina Case - Conseil de la Concurrence, Decision 06-D-24, July 2006; and, more recently, Adidas case – BKA, Decision B3-137/12, August 2014.

[97] See DOLMANS, Maurits & LEYDEN, Andrew, *Internet & Antitrust: An overview of EU and national case law,* e-Competitions, No 45647, pp.3-5; and also, SAINT-ESTEBEN, Robert, *et al, On-line reselling and selective distribution networks: What can be learnt from the French experience?,* Journal of European Competition Law & Practice, Vol. 1, No 3, 2010, page 245; and also ISRAEL, A. and JAKOBS, M., *Germany: Challenges from New Online Practices to Established Competition Law Principles,* Journal of European Competition Law & Practice, Vol. 6, No 8, 2015, page 588.

[98] See Guidelines para. 52; and also, GERARDIN, Damien, *et al*, page 493.

completely forgotten and undervalued, raises the need to establish a compromise *"between the finding that the restriction is black listed and the wishes of the firms using selective distribution to limit internet sales"*[99], and it is precisely here lays that the origin of the debate lies: being aware of the fact that limiting online sales constitutes a hardcore restriction, to what extent should we accept the objective justifications in order to exempt this restriction? That is the question we intend to answer.

2. Objective justifications

Along with the situations mentioned in the previous chapter[100], the Guidelines also foresee the possibility presenting an objective justification in order to exempt an otherwise considered hardcore restriction, as we can attest by reading their paragraph 60. Hence, many undertakings have come up with many justifications that have been under close scrutiny from both literature and jurisprudence in order to either corroborate or exclude its general application. Aware that they do not close the set, we hereby explore the two main arguments presented, since they are the ones with which we constantly deal with when reading the majority of decisions from European and national courts and authorities.

2.1. Preventing free-riding and opportunism

We are facing a free riding situation whenever the investments inherent to the selling process, such as the pre- and post-sales provided to the customers, the retail showrooms to display products, or even the advertising of the product, cannot be detached from the physical product[101]. And if normally the possibility of this occurring was high, the panorama suffered a drastic change with the digital revolution. In fact, the internet, as a retailing technology, has bestowed us with the possibility of allowing a basic transaction actively taking place at a relatively low cost, as it is possible for any supplier to engage in the activity necessary to sell the product, but for a different lower-

[99] MONTI, Giorgio, *Restraints on Selective Distribution Agreements,* World Competition, Vol. 36, No 4, 2013, page 497.
[100] See pp. 26-27.
[101] CARLTON, Dennis w. & CHEVALIER, Judith A., *Free Riding and Sales Strategies for the Internet*, The Journal of Industrial Economics, Vol. XLIX, No 4, page 442.

priced store to make the final sale[102]. When there is a risk of this type of situations occurring, it can constitute a huge discouragement for physical retailers to invest in that kind of services. As the author Margaret Slade states, "*if an upstream firm invests in improving the quality of retail facilities, it benefits not only her own brands but also the brands of rivals if they are sold in the same facilities. Absent restraints, the desirability of the investment is lessened*"[103].

In theory, the problem could be solved if dealers charged for pre-sale services separately, allowing a proper refund to the retailer or manufacturer who made the initial investment[104]. However, the practical application of such scheme is condemned from the beginning because customers are perfectly aware of the lower costs and are not willing to spend the same amount of money for a product sold via an internet platform.

2.2. Preservation of the brand image

As it is commonly known, the internet methods of retailing, known as low-cost retailing methods, do not have a favourable reputation from the customers' point of view. In the origin of this low reputation we find the many risks associated with the online selling such as counterfeiting[105], misleading or incomplete information and an overall poor service during the purchasing process[106]. The consequences of these risks can actually be absolutely calamitous, as they may concern the health and safety of consumers. As an example, we can imagine the following situation: an eatable product that does not contain all the information about its ingredients and which is bought by a person who has an allergy to an ingredient that is not in the description. By eating that

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[102] CAFFARRA, Cristina, *Selective Distribution of Luxury Goods in the Age of e-commerce: An Economic Report for Chanel,* 2008, retrieved from http://ec.europa.eu, page 19.

[103] SLADE, Margaret E, *The Effects of Vertical Restraints: An Evidence Based Approach,* in The Pros and Cons of Vertical Restraints, Konkurrensverket - Swedish Competition Authority, 2008, pp. 16-17.

[104] CAFFARRA, Cristina, *op. cit,* page 20.

[105] Notwithstanding, dealers are already trying to overcome this problem. As an example, we can mention the Vera Wang case. Vera Wang, a prestigious fashion brand, started to charge a fee for a try-out of their bridal dresses at their Shanghai store. The main ambition behind this policy was, precisely, protecting the intellectual property rights as the China market has a high rate of counterfeit products. - See LEE, Melanie, *Vera Wang scraps $500 China try-on fee, knockoffs still flourish*, Reuters, retrieved from http://www.reuters.com.

[106] Back in 2006, the author Pfrunder observed that the post-sale services were not sufficiently implemented in online sales, constituting a huge back off. - See PFRUNDER, Frédérique, *Nouvelles technologies et consommation*, Concurrence & Consommation, No 150 spécial Décembre, 2006, p. 59, *apud* OLIVEIRA, Isabel Fortuna de, *Distribuição selectiva e a internet : alguns comentários*, retrieved from http://www.academia.edu, 2011, page 22.

product the person is immediately exposed to serious health issues. Also, as far as services concerned, we may say that if consumers have a poor experience while purchasing a product online, the supplier will be the one suffering the consequences by seeing his products criticised, badly rated and, consequently, its sell rates lowered or even face the need to support a monetary cost due to some kind of compensation owed to a customer.

Due to those facts mentioned above, suppliers of branded and prestigious products, aspiring to guarantee an appropriate ambience as well as the providence of skilled advice and many other services, tend to tighten the control over the retail stores where their products are sold[107]. In fact, it becomes much more difficult to control this kind of risks when a supplier has to deal with an online platform thus being thereof, legitimate for them to adopt a more cautious approach towards online distribution in order to protect the reputation of their products[108]. However, if that is now acceptable among the literature and jurisprudence, the truth is that only in the 90's did the Commission accept this justification as an argument with the Yves Saint-Laurent Perfumes Decision [109] . Traditionally, the justification allowed was the technical improvement which the consumer could be provided with[110][111].

Three categories of products are usually acceptably considered under these circumstances, namely, technologically complex and luxury branded goods, since they require a high-quality shopping environment, some promotion and assistance, and also products where the requirement of selective distribution is connected with the characteristics of the distribution, due to the short time they will be able to remain on the shelf ("shelf-life"[112]). One thing must be asserted tough, aware of the fact that the assessment could become rather arbitrary, courts have been holding that the nature of the product encompasses not only its material composition, but also the aura of prestige

[107] KORAH, V. & O'SULLIVAN, D., *Distribution Agreements op. cit,* pp. 8 and 187-189.
[108] A S Watson, *op. cit.,* pp 5-6.
[109] European Commission, Yves Saint-Laurent Perfumes. Decision OJ [1992] L 12/24.
[110] See European Commission, Omega Watches Decision OJ [1970] L242/22
[111] SILVA, Isabel M., *Os acordos de distribuição e o Direito da Concorrência,* in Direito e Justiça: Revista da Faculdade de Direito da Universidade Católica Portuguesa, Vol. 10, No 2, 1996, page 216, footnote 115 (translated).
[112] About the latter category, see Case243/83: *SA Binon & Cie v Agence Messageries de la Presse* [1985], paras. 31-33.

and luxury that characterises its brand image and represents what is wanted by customers and promoted by manufacturers and distributors[113][114].

3. The undertakings' perspectives

As the author Louis Vogel managed to conclude, "*The case law seems to be divided into two opposing trends: the wish to promote network efficiency through the application of competition law and the ex-ante regulation of distribution systems driven more by the will to ensure the greatest degree of freedom of movement of goods or the protection of the category of competitors instead of a more neutral protection of competition as a whole.*"[115].

This debate, however, is not a novelty. Actually, since the review of the old VBER rules we face an intense debate between the promoters of a certain degree of freedom to delimitate the distribution network, on one side, and the so-called pro-internet lobby, on the other. While the former argued the importance of controlling the possibility to restrict the distribution through online platforms, the latter held that all restrictions on online sales must be individually, and strictly, justified and they should not benefit from the VBER.

3.1. The luxury goods owners' perspective

From an economic point of view, the application of restrictive clauses on online sales may give rise to both efficiencies to the consumers and competition risks[116]. The promoters of freedom to define the distribution network firmly defend that both courts and authorities should focus on the efficiencies, firstly, in order to apply a fair treatment to the supplier that included the restrictive clause in its contract and, secondly, and most

[113] Case T-19/92: *Groupement d'Achat Edouard Leclerc v Commission* [1996], paras 114-123.
[114] FAVERI, Cristiana de, *The Assessment of Selective Distribution System Post-Pierre Fabre,* Global Antitrust Review, 2014, page 179.
[115] VOGEL, Louis, *Efficiency versus Regulation, op. cit.,* page 277.
[116] Among this list of risks, we should highlight softening competition and facilitating collusion between retailers (reduction of intra-brand competition) or between the supplier and its competitors (reduction in inter-brand competition), and the foreclosing of certain categories of retailers – cf. GALARZA, A. F. *et al, Selective Distribution and e-Commerce: Recent developments in EU and national case law,* e-Competitions, no 63958, page 2.

important, to provide consumers the benefits that can come from the application of those restrictions.

Specifically targeting their argumentation towards the benefits of introducing certain bans on online sales, mainly when it is introduced within a selective distribution system , which is by them considered "*the heart of the luxury goods industry's business model*"[117], this line of thought builds their defence on an already explained argument: the preservation of the brand image, to which we remit. Therefore, it is highly defended that the pre- and post-service provided, the whole experience surrounding the purchase/sell process and the protection of the aura of luxury of the products that the client is specifically seeking should be preserved under these specific circumstances.

3.2. Third-party platforms' perspective

Third-party platforms are, essentially, intermediaries between suppliers or distributors and end customers for the sale of a particular product, despite the fact that they are not distributors or resellers themselves. Thus, they enable the supplier or distributors to sell products to end costumers through an online shopping platform, constituting an alternative to the typical brick and mortar shops[118].

Many are the reasons appointed by this side of the debate to defend a stricter approach towards the restriction of internet sales[119], such as the increase of transparency and the reduction of searching costs, the facilitation of entering the market and the mitigation of retailers' risks and marketing costs, all in all, developing a more dynamic competitive environment. Let us have a quick look through the arguments.

First of all, there are the arguments defending a higher level of transparency and lowering search costs, which are based on the idea that, since there is a much larger variety of products, customers are presented with a lot of information providing them the possibility to compare quality and prices and, overall, to be better informed about what they ought to buy.

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[117] LVMH, *LVMH Submission Concerning the review of the Community competition rules applicable to vertical restraints,* retrieved from http://ec.europa.eu, 2009, page 2.

[118] WARTINGER, Stefan & SOLEK, Lukas, *Restrictions of Third-Party Platforms within Selective Distribution Systems*, World Competition, Vol. 39, No 2, 2016, page 294.

[119] For further development, see ROBERTSON, Viktoria H.S.E., *Online sales under the European Commission's Block Exemption Regulation on vertical agreements: Part 1,* E.C.L.R.: European Competition Law Review, Vol. 33, No 3, 2012, pp. 134-135.

Secondly, as third-party platforms are seen as marketplaces where fierce inter-brand competition takes place. The immediate comparison of products of the same brand from different distributors results in fierce price competition. An absolute ban would reduce this price competition considerably.

Thirdly, there is the argument that small- and medium-sized distributors do not have sufficient funds to create a platform of the same magnitude as Amazon or eBay, for instance, therefore their platforms tend to have a rather limited access to the market. In this type of cases, an absolute ban could prevent these distributors from reaching a wider customer group or, *ultima ratio*, seal off the possibility of their entry on the market.

To conclude, we find it pertinent to quote the author Ezrachi: "*regardless of the popularity of online platforms in some jurisdictions, absolute marketplace bans are likely to reduce competition, limit access and generate a ripple effect which could undermine the competitive dynamics."*[120]. Bearing in mind these words and all that was stated above, the so-called pro-internet lobby line of thought defends that both European and national courts and authorities should have a close and tight control on the restrictions that can be appointed to online distribution in order to guarantee the maintenance of a balanced and fair competition between all the undertakings operating and trying to operate in the market.

[120] EZRACHI,Ariel, *The Ripple Effects of Online Marketplace Bans,* World Competition, Vol. 40, No 1, 2017, page 64.

V. Court and National Authorities Approaches

1. The ECJ's approach: the Pierre Fabre Case

1.1. Before the Pierre Fabre Case

Regarding selective distribution systems, it was traditionally understood that the legality of the selective distribution systems was directly connected with the compliance with certain specific qualitative criteria. Indeed, since the Metro (1) case [121], jurisprudence of the European Courts had developed the so-called *"Metro Criteria"*, which established that the nature of the product must impose a necessity to preserve its quality, as well as ensuring its proper use. Therefore, it was peacefully acknowledged that the resellers could be selected on the basis of objective criteria of a qualitative nature, provided that it was applied uniformly to all the potential distributors and not in a discriminatory manner, circumscribing strictly to the necessary extent. Later on, following the path outlined by the previous decisions, we find the AEG Telefunken case that clearly recognized that "*there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 85 (1)*" [122]. Both these decisions constituted a huge step as they ended up conveying some flexibility to the ECJ's positioning towards distribution agreements, which would be essential to the further developments of this positioning according to the market and, subsequently, to the customers' necessities. However, as far as online selling is concerned, the ECJ's position was not so flexible. Reflecting that stricter approach, we must mention a decision from 2003 [123] that clearly states that a ban on online sales should only be accepted under exceptional circumstances, highlighting that there should be a vast range

[121] Case 26/76: *Metro SB-Großmärkte v Commission (I)* [1977].
[122] Case 107/82: *Allgemeine Elektricitäts-Gesellschaft AEG-Telefunken AG v Commission* [1983], para. 33.
[123] Case C-322/01: *Deutscher Apothekerverband* [2003], paras. 106-107.

of alternatives to such a restriction. Regarding a ban on the possibility of selling pharmaceutical products via internet, the ECJ managed to conclude that the restriction lacked proportionality, arguing that EU law already provided sufficient protection.

1.2.The Pierre Fabre Case and its consequences

Pierre Fabre Dermo-Cosmétique, a manufacturer of cosmetics and other personal care products, celebrated distribution agreements for its products requiring that sales must be made exclusively in a physical space and in the presence of a pharmacist, excluding the possibility of selling their products via internet platforms. In 2008, the French Competition Authority decided that those contracts infringed both French and EU law, thus considering them a hardcore restriction under article 101(1). That decision was challenged in front of the Cour d'Appel de Paris[124], which decided to address the ECJ a request for a preliminary rule about article 101, inquiring whether a general and absolute ban on internet sales constitutes a restriction by object and if it could benefit from any exemption. In its decision, handed down on 13th October 2011, the ECJ ruled that a contractual clause requiring sales to be made in a physical space constituted a restriction by object unless the clause is objectively justified by the nature of the product itself[125]. Regarding this possibility of objectively justifying this type of clauses, the ECJ held that a ban on internet sales may only be appropriately justified where there is a necessity to provide individual advice to customers and ensure their protection against incorrect use[126].

Notwithstanding, a critical comment is now in order. In fact, the ECJ starts by stating that it does not rely on the mere form of restraints, but in coherence with the settled case law, it adopts a case-by-case approach, considering the content, objectives and legal and economic context of each case[127]; However, it ends up by defining that a ban on online sales within a selective distribution system must be qualified as a restriction by object, unless objectively justified, which tends to be just what it aims to avoid: a mere void of a clause based on the mere form of the restraint. And, in fact, the economic analysis was not done, since both intra- and inter-brand competition were

[124] Cour d'Appel de Paris: *Pierre Fabre Judgement*, of 29th October 2009.
[125] ROMANO, V. C., *ECJ Ruling on the Prohibition of On-line Sales in Selective Distribution Networks,* Journal of European Competition Law & Practice, Vol. 3, No 4, 2012, pp. 345-347.
[126] Pierre Fabre case – paras. 41-43.
[127] Pierre Fabre case – paras. 34-35.

very strong in that market, allowing this kind of restriction to be implemented when some reasonable criteria was recalled, as Pierre Fabre managed to do, in our humble opinion, even though the ECJ decided differently[128][129].

As for the Jaguar Land Rover decision, held in 2012 after the Pierre Fabre case already mentioned above, we find it brings a different input. With this decision, we are able to testify a more realistic and pragmatic approach, anchored in the conviction that the role of competition law is to endorse competition and not to protect particular operators wishing to force network heads to accept them. By qualifying special criteria as the precise content against which it may be verified, the ECJ grants the supplier freedom to set a *numerus clausus* without having to previously objectively justify the list in a uniform manner[130][131]. Although this decision does not specifically mention online sales, the truth is that the "*greater freedom gradually recognised for networks to the limits of competition law is however called partially into question by the recent developments in the case law favourable to online selling by distributors on marketplaces*"[132]. Following the same line of thought more recently the Commission has also been defending a more flexible economic-based approach. We can substantiate this by reading its recent Preliminary e-Commerce Report, in which the Commission noted that the impact and the importance of marketplace bans vary significantly between MS and product categories, arguing that the ruling in Pierre Fabre is not on point, leaving the door open for a renewed interpretation [133].

2. National Courts and Authorities' approaches

Also, among the national courts and authorities' decisions, resembling what we have concluded above, we may find two different approaches concerning the treatment to be given to the ban on online sales. On the one hand, some defend that there shouldn't be any left space for the existence of restrictions on online sales. On the other hand, we

[128] In the ECJ's viewpoint, maintaining a prestigious image as such is not a legitimate justification for restricting the competition – See Pierre Fabre case, para 46.
[129] Cf. ROMANO, V. C., *ob. cit,* pp. 345-347; and also VOGEL, Louis, *Efficiency versus Regulation, op. cit.,* page 282.
[130] Jaguar Land Rover case – para. 15.
[131] VOGEL, Louis, *Efficiency versus Regulation, op. cit.,* pp. 277-280.
[132] VOGEL, Louis, *The Recent Application of EU and National Competition Law to Distribution Agreements: Does Competition Law Promote Efficient Distribution Networks?,* Journal of European Competition Law & Practice, Vol. 7, No 9, 2016, page 632.
[133] See European Commission, *Commission Staff Working Document*, *op. cit,* page 156.

find a more flexible and effects-based line of thought that advocates the need to analyse every situation and evaluate the need to objectively justify some restrictions, inclusively as far as online selling is concerned.

In defence of the first position, we should start by mentioning a German authority decision[134] that, by issuing a stricter decision, ruled that in this regard restrictions imposed on online sales of contact lenses were not justified, arguing that less restrictive options could have been adopted, such as requiring proof of a recent contact lens fitting. Defending the existence of an alternative, it shrunk the possibility of justifying a ban on online sales. Later, in its Adidas Judgement[135], the German authority went further still and stated that suppliers should be prohibited from largely eliminating a principal distribution channel, with so including the internet channel. Following the same level of strictness, we find the Casio decision by the Schleswig Higher Regional Court[136], which ruled that the supplier was strictly prohibited to ban its retailers from selling via online market places such as Amazon and E-bay. The German court stated that such a ban could limit intra-brand competition on online market-places and therefore force a reduction of pressure on prices. It had, also highlighted that consumers trusted transaction security on the established online market-places, which is a major indicative that this constitutes an advantage from the customers' point of view. The German court also highlighted that Casio's justifications, mainly supported by the need to ensure quality and a specialized assistance, could not be taken into account outside a selective distribution system, establishing that the ban on online sales should be completely prohibited outside a selective distribution system[137].

Supporting the latter position we also find many decisions from all around Europe, mainly in France and Germany but also Spain, as we will see. As the author Dolmans manages to conclude, among these decisions *"it appears that a pragmatic approach was taken to restrictions on distribution of goods via the internet, with NCAs and courts acknowledging the need to protect investments by selective distributors against free riders, while balancing this with the interest of the online rival, albeit to varying degrees*"[138]. Let us take a closer look.

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[134] German Federal Cartel Office (Bundeskartellamt), Decision no B 3 – 123/08, of 25th September 2009.
[135] German Federal Cartel Office (Bundeskartellamt), Adidas AG decision, of 2nd June 2014.
[136] Higher Regional Court of Schleswig, Casio Judgement, of 5th June 2014.
[137] ROSE, Alexandra, *German Court Gives Green Light to Online Market Places Sales in Non-Selective Distribution Networks*, Bryan Cave Law firm, retrieved from http://www.eu-competitionlaw.com.
[138] DOLMANS, Maurits & LEYDEN, *op. cit,* page 4.

Analysing first the French line of thought in deciding this topic, we could not refrain from citing the Festina case, already mentioned above, which drove the French authority's attention, in which the French Court[139] decided that the criteria imposed should be the same, regardless of whether the sales were to be done in a physical or an online marketplace, provided that those criteria were applied objectively, transparently and in a non-discriminatory manner. In the vein of this argumentation, we must also mention the Bang & Olufsen case[140], in which the French court decided that by absolutely preventing its authorised distributors from engaging on any online sales of some of their products, namely the less well-developed and cheaper ones, such as earphones and accessories which were particularly suitable for online sales, Bang & Olufsen had imposed restrictions which were not essential for maintaining an efficient distribution network. Even though it was decided not to exempt that specific situation, the truth is that by *a contrario sensu,* the French court appears to understand that other more complex products, with specific properties, would objectively justify a ban on online sales[141].

Scrutinising the German courts and authorities' positioning in this matter, we are also able to find a more economic-based approach, focusing on the particularities that each and any case has to offer therefore establishing that an objective justification could raise the opportunity to exempt a restriction on online sales that would otherwise be considered an infringement of EU competition law. As an example, we shall mention a decision by the Higher Regional Court of Karlsruhe[142] which established that the prohibition of distribution on online platforms did not constitute an infringement of competition law, as it was considered an objective aspect of a qualitative nature. Since advertising and product presentation could be considered an essential tool for maintaining a certain level of luxury environment surrounding the brand's image, the supplier should then be able to decide to position its brand as a high-end product and therefore request certain quality standards. Similarly to what was established with this

[139] Court d'Appel de Paris: *Festina Judgement*, of 16th October 2007.
[140] Cour d'Appel de Paris: *Bang & Olufsen Judgement*, of 13th March 2014.
[141] This rather flexible approach is completely understandable in France since it houses a wide number of the world's most recognized luxury brands. – See AHMED, Sofia H., *Life, Liberty, and the Pursuit of Luxury: eBay's Liability for Contributory Trademark Infringement in the United States, Germany, and France,* Brigham Young University International Law & Management Review, Vol. 5, Issue 2, 2009, page 249.
[142] Higher Regional Court of Karlsruhe (OLG): *School Satchels*, Judgement of 2010, paras 9 and 53-59.

decision, the Appeal Court of Berlin[143] ruled that the prohibition of distribution on open marketplaces was a legitimate action in a selective distribution system. This would especially apply if a certain image becomes a product characteristic because of the supplier's efforts to position its brand as such on the market. Following the same logical construction, the Higher Regional Court of Munich[144] also defended that suppliers should be free to forbid their retailers from distributing their products on open marketplaces, thus allowing the ban on online market places to be exempted, provided that there is a fair and reasonable justification behind that specific restriction.

Exploring the line of thought that Spanish courts have been following, we find that they tend to have a less formalistic approach, conceding the possibility to restrict online sales when the situation is objectively justified. An interesting decision that clearly reflects this position is presented by the Juzgado de lo Mercantil de Palma de Mallorca[145], in which the Spanish court defended that the owners of a luxury brand could restrict the sale of their products on online platforms, which were considered low-cost, in order to preserve their quality and luxury image. In the same vein, we have another Spanish court decision[146] that also defended that luxury brand owners should be able to require from their non-authorized distributors the fulfilment of the same criteria imposed to the authorized distributors, enhancing the need to protect the brand as a legitimate justification in some cases[147].

[143] Appeal Court of Berlin (KG): *Scout School Satchels*, Judgement of 2013.
[144] Higher Regional Court of Munich (OLG): *Sporting Goods*, Judgement of 2013, paras 22-31.
[145] Juzgado de lo Mercantil de Palma de Mallorca, Decision no 103/2015, of 10th April 2015, page 12.
[146] See Tribunal de Marca Comunitaria de la Audiencia Provincial de Alicante, Decision no 124/2015, of 11th June 2015.
[147] TEINDAS, Jean-Yes, *A vueltas con la distribución selectiva y la venta online,* Cuatrecasas, retrieved from http://blog.cuatrecasas.com, 2016.

V. Conclusions

Since the current framework on online sales strictly confines the ability of suppliers to restrict internet sales, the Commission tries to counterbalance by introducing a more economic based approach, thus acknowledging the existence of efficiencies that may narrow the scope of application of the block exemption. However, this attempt is far from having been achieved, given the fact that the ECJ, some NCAs and National Courts remain anchored to previous formalistic approach. We believe that this rather formalistic approach is due to the fact that the Commission still gives a different treatment to online distribution in comparison to bricks and mortar distribution, and that is not correct, as it shows a retrograde perspective of the issue. Indeed, if there was a time when the internet distribution channel was not developed enough, justifying the need to implement its growth by applying a stricter regulation, nowadays, given the possibility of suppliers to impose restrictions on the physical distribution, but not equivalent restrictions on online distribution, that is no longer appropriate given the growth and increased sophistication of the internet as a completely mature distribution channel *per se*.

And, in fact, in the Pierre Fabre case we have a glimpse of an attempt to distinguish the internet sales from the brick and mortar sales, acknowledging the fact that they are different realities which ought to be analysed from different perspectives. A tendency that was continued and further developed by some national cases and authorities' decisions, as we saw above. As a matter of fact, although the Pierre Fabre case established that a ban on online sales should not be accepted, the truth is that, if we analyse it closely, it appears to open a very important door that ought to be explored, which is precisely the possibility of accepting this kind of restrictions based either on an objective justification regarding the properties of the products at issue or, as a last resort, an individual exemption.[148] It is also true that it quickly blocks these possibilities by defending that the preservation of brand image is not a legitimate objective[149], however, given the fact that we hereby advocate for a more flexible, economic based approach, here lies the base on which we must uphold our ideas. We strongly believe that the Pierre Fabre case blunders in the application of the concept of restriction by

[148] VOGEL, Louis, *The Recent Application of European Competition Law, op. cit,* page 458.
[149] Pierre Fabre case, para. 46.

object applied to this particular issue of online sales, as it does not recall into question the effects-based analysis. As the author Vogel wisely concludes, "*Differently from an agreement on price or market sharing agreement where the effects on competition are in principle, purely negative, the ban on online sale of products also has positive effects on competition. It is therefore insufficient to record the disproportionate nature of a clause which is a de facto ban on online sales, in order to condemn a system, because a competitive assessment must be made."*[150]. Once again, we must say that the problem lies in the different treatment given to online distribution, which compels both European and national courts and authorities to lean towards a more formalistic line of thought.

In our opinion, it is the construction of the regulation itself that leads to this loose interpretation. In fact, by having a black list of clauses which are presumably harmful and a generalist clause that foresees the possibility of objectively justifying the application of those restrictions, plenty of space is left to the courts and authorities to decide whether a restrictive clause is objectively justified facing the particularities of the case, and this is only intensified by the stricter treatment that is given by the ECJ to online sales when compared with the brick and mortar sales. Thus, we believe that a clarification of the framework towards an (even) more economic based approach is in order, if possible before the VBER and its accompanying Guidelines expire. Guided by consumer welfare as the key principle that supports the basis of competition policy, the focus should lay on the efficiencies that some restrictions may bring to consumers. Consequently, bearing in mind that the objective justifications that the Guidelines include are still sparse and vague, we firmly believe competition law would face a huge benefit if the Commission worked towards constructing a clear and solid list of objective justifications that can be applied to the clauses containing hardcore restrictions. Notwithstanding, aware that this is very ambitious, what we hereby propose is a supplementary flexibility from the ECJ, NCAs and National Courts in order to accompany the real evolution and necessities of the market.

We must nevertheless say that we strongly believe not everything is wrong. As we had the opportunity to see above, even though national courts and authorities started by applying more formalistic decisions, anchored to what was said in the Pierre Fabre case back in 2011, which, we must remind, was examined under the remit of the old

[150] VOGEL, Louis, *The Recent Application of European Competition Law, op. cit,* pp. 455-457; and also, VOGEL, Louis, *Efficiency versus Regulation*, *op. cit,* pp.281-282.

VBER, what we have nowadays been increasingly facing are more flexible decisions, concerned with the positive impact that restrictions on online sales could bring to consumers and to the general development of the internal market. We believe that this is the correct path to tread, since it is the only way to truly follow the so-called digital revolution that has been under the spotlight of the European concerns (as we saw above in chapter one).

Inevitably focusing on what we stated in the beginning of this study, we hereby conclude that the European competition policy needs to adapt to the new digital single market. Firstly, it must be completely aware of the development of the internet and its consequences on distribution law. Then it must gradually adapt the current framework applicable to vertical restraints and more specifically to distribution agreements and, more importantly, adapt the approach of the ECJ towards these matters, which will most certainly influence the national courts and authorities' path. And, even though nowadays we face a laconic scenario, reflecting the imminent uncertainty, the truth is that the ECJ has in hands the possibility to restore the need of stability with the preliminary request that was addressed by Oberlandesgericht Frankfurt am Main, the Coty case already mentioned above.

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